In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-753
77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

v.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ERISA Industry Committee (ERIC) respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief

in this case as *amicus curiae* in support of the petitions for certiorari. In support of this motion, ERIC shows as follows:

1. This motion is necessitated by the refusal of the respondent to consent to the filing of a brief by ERIC as *amicus curiae.*

2. The ERISA Industry Committee (ERIC) is a nonprofit corporation, composed of 80 United States corporations, engaged in a wide cross section of American business in such industries as automobile manufacturing, electrical manufacturing, retailing, steel, photographic equipment, metals, insurance, banking, telephone, pharmaceuticals, chemicals, petroleum, airlines, rubber, as well as various service industries and utilities. These corporations have for years maintained one or more retirement plans for the benefit of their employees, many of which plans have been negotiated with unions. In all, these 80 corporations maintain a total of over 900 separate employee retirement plans covering nearly 7,000,000 employees, which is more than 20 percent of all American employees covered by private retirement plans. Through ERIC, these companies coordinate their views and provide practical information and recommendations to government on how the private pension system functions, and on the impact of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 (ERISA) on pension plan participants and plan sponsors. This includes rendering assistance to courts in their deliberations on significant employee retirement plan issues of broad concern to employers, including the filing of a brief *amicus curiae* with the Seventh Circuit in the case now before this Court.

3. As decided by the Court of Appeals, this case stands for the novel proposition that an employee's participation in a retirement plan which covers him automatically and at no cost to him is subject to the antifraud provisions of the Securities Acts of 1933 and 1934. As a consequence, the failure to provide an employee with certain information never before thought to be material has and will render unions, employers, plans and plan administrators liable for massive money damages. Although the Seventh Circuit's decision involves only a claim against the plaintiff's union and its retirement fund, that decision does raise the prospect of similar liability for employers such as those represented in ERIC.

4. Because no employer, union, trustee, plan administrator or, indeed, the Congress or SEC, has ever understood that the antifraud provisions apply, the Seventh Circuit's decision raises the prospect of such persons becoming subject to the payment of billions of dollars and may encourage extensive vexatious litigation under the Securities Acts. Further, the decision may severely disrupt collective bargaining in a manner counter to our nation's labor policy and will create significant administrative problems for retirement plan administrators. In addition, because no employer is involved as a party in this case, the interests of employers concerned with the administration of retirement plans may well be unrepresented in this Court's consideration of the petitions for certiorari unless our request to file the accompanying brief is granted.

WHEREFORE, it is respectfully moved and requested that the ERISA Industry Committee (ERIC) be granted leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE PETITIONS FOR CERTIORARI

The ERISA Industry Committee (ERIC) hereby submits this brief in support of the petitions filed in Nos. 77-753 and 77-754 for writs of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 20, 1977.

INTEREST OF THE *AMICUS CURIAE*

A statement describing ERIC and its interest in this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

REASONS FOR GRANTING THE WRITS

INTRODUCTION

The importance of the Seventh Circuit's decision in this case and the need for prompt review by this Court cannot be overstated. The decision of the Seventh Circuit has received unprecedented press coverage. It has already been discussed in congressional hearings and has been the subject of congressional comment. The prestigious American Law Institute and the American Bar Association Committee on Continuing Professional Education have scheduled a two-day course of study on the implications of the Circuit's "landmark opinion" on retirement and employee benefit plans. Attorney experts in the field of retirement plans are already discussing in print the problems created by the decision. Two reported federal district court decisions have examined the District Court's decision affirmed by the Seventh Circuit in this case and have disagreed with it (*Robinson* v. *UMW Health and Retirement Funds,* 435 F. Supp. 245 (D. D.C. 1977); *Weins* v. *International Brotherhood of Teamsters,* 132 Pens. Rep. (BNA) D-5 (C.D. Cal. March 28, 1977)). Another district court held contrary to the Seventh Circuit prior to its decision below (*Hurn* v. *Retirement Fund of the Plumbing, Heating & Piping Industry of Southern California,* 424 F. Supp. 80 (C.D. Cal. 1976)). Another unreported district court decision has flatly disagreed with the Seventh Circuit (*Cinnamon* v. *Brooks,* No. CV-77-204 LTL (C.D. Cal. 1977), cited in *Daniel* v. *International Brotherhood of Teamsters,* Petitioner's Brief for Certiorari, No. 77-753 ("Petitioner's Brief") at Appendix A (Nov. 25, 1977)). At least 17 court actions have been started based in whole or in part on the decisions below (Petitioner's Brief, *supra*). The SEC has already obtained a consent court decree against pension and welfare funds based in part on the decisions below and one district court has agreed with the Seventh Circuit (*see* note 11, *infra*).

These events surrounding and following the Seventh Circuit's decision add weight and meaning to each of the five points made below in support of our request that this Court grant the requested writs.

A. The Seventh Circuit Erred In Its Holding That The "Antifraud" Provisions Of The Securities Acts Of 1933 And 1934 Apply To An Employee's Acquisition And Retention Of Rights In A Private Retirement Plan And, In So Doing, Has Created Confusion On An Important Question Of Law That Should Be Promptly Decided By This Court.

Daniel, a retired truck driver who was a member of Teamsters Local 705 for more than 22 years, was denied a pension in 1973 when he retired because of illness. The basis for the denial was that Daniel had failed to meet a plan requirement of 20 years' continuous service because he had been involuntarily laid off for three months at the end of 1960. Daniel, in addition to other causes of action not before this Court, has complained that he was misled and defrauded by his union's failure to make clear what cir-

cumstances would preclude him from receiving a benefit and by his union's failure to disclose the actuarial likelihood of his receiving a pension. Daniel contended that if he could prove these allegations at trial, he would be entitled to relief under the antifraud provisions of the Securities Acts on the theory that his union failed to disclose material information to him with respect to his participation in the plan. The District Court and the Seventh Circuit agreed. The Seventh Circuit stated that an employee's interest in a noncontributory, compulsory retirement plan [1] involved the "sale" of a "security" for purposes of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. Accordingly, it held that Daniel was entitled to a trial on his claim under the Securities Acts.

In reaching its conclusion, the Seventh Circuit held that (1) by commencing employment with an employer who offers a retirement plan; (2) by voting with his fellow workers to accept a collective bargaining agreement negotiated by his union representative and containing a retirement plan; or (3) by continuing to work for his employer, an employee accepts an offer of sale of a security and, accordingly, acquires a right to full disclosure of all material information concerning that plan. The Seventh Circuit found that the latter information must at least include the actuarial assumptions upon which an employee's benefits are computed. Further, if all such information is not provided to the employee, he has a cause of action for money damages, which damages may include the payment of retirement benefits—the remedy sought by Mr. Daniel.[2]

[1] A plan is "noncontributory" in the sense that the employer pays all moneys into the fund—the employee contributes nothing. A plan is "compulsory" in the sense that employees may not choose whether or not to be covered—they are covered and contributions are made on their behalf automatically because they are employed.

The Seventh Circuit's decision has created confusion in the minds of those who sponsor, bargain and administer retirement plans, for the decision is at odds with congressional understanding of the law and is in direct conflict with district court decisions on the issue.

Congressional understanding of the law seems clear. Thus, Congress, following the lead of the SEC, has understood for over 30 years that the Securities Acts do not apply to the acquisition or retention of an employee's interest in a compulsory, noncontributory retirement plan.[3]

[2] Although this case involves only a claim against the plaintiff's union and the retirement trust funds, the decision at least raises the prospect of similar liability for employers. Thus, it is at least possible that an employer's liability may be based upon the theory that he aided and abetted in the sale of the security (the retirement plan) (*In re Caesars Palace Securities Litigation*, 360 F. Supp. 366 (S.D.N.Y. 1973); or may be based upon analogous theories (*e.g., Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (liability, as a party to a collective bargaining agreement)). The Seventh Circuit, however, found it unnecessary to consider the issue of employer liability (*Daniel*, No. 76-1855, slip op. at 50 n. 61).

[3] Early in the history of the Securities Acts, the SEC determined that they were not applicable to an involuntary, noncontributory retirement plan for, in the words of SEC Commissioner Purcell:

> As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike

Not only has this been Congress' understanding, but it also acted accordingly by promulgating the Employee Retirement Income Security Act of 1974

the company's investment plan. (*Daniel,* 410 F. Supp. 541, 548 (N.D. Ill. 1976), *quoting* Hearings on Proposed Amendments to Securities Act of 1933 and Securities Exchange Act of 1934 Before House Comm. on Interstate and Foreign Commerce, 77th Cong., 1st Sess. ("Hearings") at 907, 908. *See also, First Union, Inc.,* [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,597 (1971).

Further, Congress has understood this to be the law. Thus, Congressman Wolverton, one of the 1933 Act draftsmen, stated in 1941:

> Then you ought to know the truth of what I am saying. Supervision of pension plans, and so forth, were never considered to come under the Securities Act. (Hearings at 888. *See also,* Congressman Wolverton's comments at 894, 913, 980 and 981).

In 1972, an Interim Senate Report stated:

> Pension and profit-sharing plans are exempt from coverage under the Securities Act of 1933 . . . , unless the plan is a voluntary contributory pension plan and invests in the securities of the employer company an amount greater than that paid into the plan by the employer. (Interim Report of Activities of Private Welfare and Pension Plan Study, 1971, S. Report No. 92-634, 92d Cong., 2d Sess. at 96 (Feb. 22, 1972)).

And in 1976, Congressman Dent stated:

> Other parts of ERISA require careful review at this time. A recent Federal court decision raises the specter that yet another Federal agency, the Securities and Exchange Commission, will become involved in the regulation of employee benefit plans, a result clearly unintended when we enacted ERISA. Certainly Congress must be prepared to act if in fact this case is not reversed on appeal. [1976] 174 Daily Lab. Rep. (BNA) at A-6.

("ERISA"), 29 U.S.C. § 1001, *et seq.* A major purpose of ERISA is to deal with precisely the kind of inequities which faced employees like Mr. Daniel and led to his lawsuit.[4] However, at the same time, Congress carefully balanced the need to protect employee retirement expectations against the need to not so overburden employers with costs and administrative red tape as to dissuade them from starting or continuing retirement plans.[5]

However, the Seventh Circuit has now decreed that the antifraud provisions require disclosure of information, without alerting retirement plan sponsors and administrators as to when the disclosures must be made or specifically what must be disclosed.[6] Further, if as yet unknown material facts are not disclosed at as yet unknown times, lawsuits and potentially massive liability face unions, employers, administrators and plans.

The dilemma now facing employers, sponsors, unions and administrators is simply stated: "Do we

[4] *E.g.,* Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes, 1976) ("ERISA Leg. Hist."), Vol. I at 90-92, 1267; Vol. II at 1599, 3474; Vol. III at 3584, 4282-83, 4656-57).

[5] *E.g.,* ERISA Leg. Hist., Vol. II at 1776; Vol. III at 4800. Indeed, in striking that balance, Congress made a specific decision that preenactment service breaks, such as Mr. Daniel's, would be left unaffected and would remain as valid reasons for denying retirement benefits (29 U.S.C. § 1053(b)(1)(F)).

[6] "Material" information must be disclosed, and what is "material" must be determined on a case-by-case basis. (*E.g., SEC* v. *Shapiro,* 494 F.2d 1301, 1306 (2d Cir. 1974)).

follow Congress' approach set forth in ERISA and continue to attempt to meet the specific disclosure requirements of that Act, or do we spend the time and money necessary to prepare and distribute a constant flood of new information to employees as required by the Seventh Circuit?" Or, more troublesome, "do we heed the Seventh Circuit and terminate our retirement plans, or fail to start new ones, in order to protect ourselves from lawsuits and financial ruin?"

The confusion and dilemma is heightened by four district court decisions which have disagreed with the Seventh Circuit's analysis and have held that the Securities Acts of 1933 and 1934 do not apply to an employee's participation in a compulsory, noncontributory retirement plan. Three of those decisions were handed down after the District Court opinion, which was affirmed by the Seventh Circuit, but predated the Circuit's decision (*Hurn, supra; Robinson, supra; Weins, supra*). The last followed the Seventh Circuit's decision (*Cinnamon, supra*). (*See also* note 11, *infra* for one court which has apparently agreed with the Seventh Circuit).

This conflict and resulting confusion creates substantial problems for companies, like those represented in ERIC, that maintain nationwide retirement plans, for different disclosure rules now apply in different jurisdictions. It is this confusion that we ask this Court to now resolve by granting the requested writs.

B. The Seventh Circuit's Decision Creates Potential Liability That Could Destroy Private Retirement Plans.

As earlier stated, the Seventh Circuit has required that retirement plan participants be advised of at

least the actuarial basis upon which their benefits are computed. Further, failure to provide that information now supports a lawsuit for damages, most likely in the form of retirement benefits not technically earned under a plan, but nonetheless payable because of the failure to disclose. However, ERIC is aware of no employer or retirement plan that has ever disclosed such actuarial assumptions because no one ever believed them to be relevant or particularly useful to plan participants. Indeed, until the District Court's decision below, "no court had ever held, nor apparently had anyone including the SEC the temerity to argue that an interest in an involuntary, noncontributory pension or health benefit plan was covered by the securities laws." *Robinson, supra* at 247 (footnote omitted). Accordingly, the practical consequence of the Seventh Circuit's decision is that every retirement plan participant in the country has been denied material information and thus has a claim to a vested retirement benefit even though he or she has not met the requirements of his or her plan for a benefit. And this result applies even as to participants who are covered by the most reasonable plans containing the most reasonable eligibility requirements.

As such, tremendous unanticipated liability in the billions of dollars may await plans, unions, employers and administrators as the sellers of pension benefits.[7]

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[7] It is unclear whether the Seventh Circuit would award benefits or merely a payment to a plan participant of contributions made on his behalf. Even in the latter case, presumably involving lesser liability, one can assume significant liability. Thus, by way of example, in 1970 the average annual

The prospect of such liability may well cause some employers to end retirement benefits for their workers and some to give up any idea of instituting retirement programs. That statement is consistent with the judgment of Congress. Thus, in the Senate's floor debate on the ERISA Conference Report, Senator Nelson stated:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers. (ERISA Leg. Hist., Vol. III at 4800).[8]

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employer contribution on behalf of an employee was $400 (Institute of Life Insurance, Pension Facts 1975 at 30) so that potential liability to 20 million workers who may not receive retirement benefits because of the eligibility requirements of their plans (only about 1/3 of the 30,000,000 covered employees may receive benefits (ERISA Leg. Hist., Vol. I at 203, Vol. II at 1599)) exists in the amount of $8 billion ($8,000,000,000) for each year of contribution, or at least $56 billion since 1970.

[8] Further, Senator Williams responded in early ERISA debate to Senator Hartke's efforts to impose stringent and costly requirements upon pension and benefit plans, by stating:

> Mr. President, until the Senator does impose upon employers the mandate to have pension plans, I would think that all of the provisions that the Senator would offer, put together, would just kill off any attitude on the part of the employers who do not have any pension plans to come on in. (*Id.*, Vol. II at 1776).

These concerns have proven to be accurate. For example, the House Small Business Committee recently published the results of a questionnaire sent to small businesses who intended to terminate existing retirement plans. Those results indicated that 92 percent of those businesses were motivated, at least in part, to terminate plans because of the increased costs mandated by ERISA. ([1977] 160 Pens. Rep. (BNA) at A-2—A-3, R-11—R-13). Clearly, if ERISA is causing terminations, the Seventh Circuit's decision which poses the threat of massive liability and increased costs will not only accelerate terminations but will drastically curtail the development of new plans.

As troublesome as such liability may be to employers, it may have even worse consequences for unions which generally do not have the financial resources necessary to avoid complete financial ruin. Prudent unions may no longer negotiate with management over retirement benefits. A district court recently reviewed an attempt to render unions liable for failure to police job site safety and stated:

> Union funds are derived from its members and only the largest unions may be potentially able to absorb the type of loss involved in this case. While unions may seek insurance coverage, the cost must be borne by the membership. Unions do not have finite limits of liability as do employers under workmen's compensation, nor can unions pass along such a loss to the public as

may an employer. Moreover, the result is readily apparent, if unions could be held liable in cases such as this—there would be no negotiation on safety matters. To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy. (*House* v. *Mine Safety Appliances Co.*, 417 F. Supp. 939, 946-47 (D. Idaho 1976) (footnotes omitted)).[9]

In sum, the threat of massive liability occasioned by the Seventh Circuit's application of the Securities Acts to private retirement plans threatens not only the financial security of funds, unions and employers, but also establishes a substantial deterrent to the institution and growth of private retirement plans. Accordingly, it is particularly critical that this Court grant the requested writs and settle the issue before plans are terminated, decisions are made to withhold new plans, or plans are bankrupted by massive money claims.

C. The Seventh Circuit's Decision Threatens Extensive Litigation.

Certainly, the potential for increased litigation in the field of pensions has been heightened by the Seventh Circuit's decision, a potential which again may

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[9] The Sixth Circuit has concluded in an analogous situation.

> Such . . . would simply deter unions from engaging in the unfettered give and take negotiation which lies at the heart of the collective bargaining agreement . . . . Such result would not serve the interest of . . . [employees] and would retard rather than advance the goals of the National Labor policy. (*Bryant* v. *International Union, UMW of America,* 467 F.2d 1, 5, 6 (6th Cir. 1972), *cert. denied,* 410 U.S. 930 (1973) (footnotes omitted)).

threaten the financial stability of plans, unions and employers and which may further deter the growth of our nation's system of private pension plans.

In *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), this Court recognized that it was unwise to expand the class of persons who could commence suit under the antifraud provisions of the Securities Acts. Thus, for example, this Court concluded that if a plaintiff could survive a motion to dismiss, he could use discovery to take up the time of other people and, in conjunction with claims for massive relief, thereby increase his chance of a favorable settlement even if his claim was largely groundless.

These concerns are especially relevant to the application of the Securities Acts to retirement plans, for no one has ever thought it necessary to disclose information such as a plan's actuarial assumptions to employees prior to their participation in a pension plan. Accordingly, it is reasonable to anticipate that extensive litigation will follow fast on the heels of *Daniel.* Even if the chances of success by a plaintiff are slim, extensive litigation expenses will confront defendant employers, unions and retirement plan administrators. If such suits are commenced as class actions, as was Mr. Daniel's suit,[10] the potential liability realistically raises the specter of bankruptcy for employers, unions and retirement funds, thus increasing the motivation to settle even the seemingly most groundless claim.

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[10] Mr. Daniel commenced his suit against the International Teamsters Union, all local Teamster unions, all trustees of all Teamster pension funds and all the officers of all Teamster unions, and did so on behalf of every Teamster member in the country who has participated in a Teamster pension fund.

In sum, the threat of extensive litigation with its attended costs and possible unrealistic settlements will be with us until this Court settles the issue now before it.[11]

D. The Seventh Circuit's Decision Adds Excessive Additional Administrative Burdens.

One of the major concerns of the Congress in enacting ERISA was that the additional administra-

[11] The need for quick action by this Court is highlighted by the vast publicity this case has received in the press (*e.g.*, Washington Star, Nov. 8, 1977, at B-7, col. 5; N.Y. Times, Aug. 23, 1977, at 49, col. 4; Wall St. J., Aug. 23, 1977, at 8, col. 2; N.Y.L.J., Sept. 27, 1976, at 25, col. 1; Pensions & Investments, April 11, 1977, at 1, col. 1); and in congressional hearings (*e.g.*, [1977] 184 Daily Lab. Rep. (BNA) at X-2—X-3). Further, the American Law Institute and the American Bar Association Committee on Continuing Professional Education have scheduled a two-day course of study entitled "ERISA and the Federal Securities Laws" for the purpose of studying the "landmark opinion of the Seventh Circuit in *Daniel* . . . ." (ALI-ABA CLE Rev., Nov. 18, 1977, at 1, col. 2). Attorney experts in the field of retirement plans are already discussing in print the problems created by the Circuit's decision (*e.g.*, Alef and Short, *Problems Created by CA-7 Decision that Pension Plan Participation is a Security*, J. of Taxation 282 (Nov. 1977)). At least 17 court suits have been started based in whole or in part on the decisions below (Petitioner's Brief at Appendix A). Even more compelling is the report that the SEC has already obtained a consent court decree (without legal argument or contest) based in part upon the Seventh Circuit's decision (Pensions & Investments, Oct. 24, 1977, at 1, col. 1). Further, we have just been advised that one district court has agreed with the Seventh Circuit's opinion (*Schlansky* v. *United Merchants and Manufacturers, Inc.*, Civ. No. 76-5799 (S.D.N.Y. 1977)), cited in Petitioner's Brief at Appendix A.

tive burdens required by that Act (particularly the extensive reports and disclosures required) might act as a disincentive to the start-up or continuation of retirement plans. Indeed, those concerns were well founded, for an Interim Report on Pension Forms by Senator Nelson [12] has concluded that many small private pension plans have been forced out of existence in part because of the burdensome paperwork occasioned by ERISA's reporting and disclosure requirements ([1976] 194 Daily Lab. Rep. (BNA) at 1, A-5—A-6, X-1—X-4). To that burden the Seventh Circuit has now added the disclosures required by the antifraud provisions of the Securities Acts. And more distressing is the fact that in this latter case, no one knows exactly what to disclose or when.

One of the means by which Congress sought to deal with the administrative burdens that might result from ERISA's enactment was to provide for broad federal preemption of all state laws regulating employee benefit plans.[13] In this manner, Congress

[12] Senator Nelson is the Chairman of the Senate Small Business Committee and Senate Finance Subcommittee on Private Pension Plans.

[13] ERISA Section 514(a) (29 U.S.C. § 1144(a)) provides:

> [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) and not exempt under Section 1003(b) of this title.

Further, in introducing the Conference Report on ERISA, Senator Harrison Williams, Jr. (D-NJ), Chairman of the then Senate Committee on Labor and Public Welfare, explained (ERISA Leg. Hist., Vol. III at 4745-46):

sought to relieve employer burdens by at least removing state regulation of retirement plans and their attendant, and often conflicting, reporting, disclosure and other requirements. However, the Seventh Circuit has now plowed a deep hole through that granted relief, providing further disincentives to the start-up and continuation of private retirement plans.

Section 18 of the Securities Act of 1933 [14] and Section 28(a) of the Securities Exchange Act of 1934[15] specifically save the jurisdiction of the states

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

[14] 15 U.S.C. § 77r: Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

[15] 15 U.S.C. § 78bb(a): The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

to regulate any securities and Section 514(b)(2)(A) of ERISA specifically disallows federal preemption of state laws regulating securities.[16] The Seventh Circuit has now stated that an interest in a retirement plan is a "security," so that the various state Blue Sky laws may now separately regulate the form and substance of all disclosures to retirement plan participants. Thus, what was thought to be a limited exception to ERISA's requirement of federal preemption has instead become an exception which basically eliminates preemption in the area of disclosures to retirement plan participants.

Once again, before plans are terminated or moneys are expended from retirement funds in an effort to meet the various still unknown requirements of the Securities Acts and the state Blue Sky laws, we urge this Court to grant the requested writs and resolve the uncertainty created by the Seventh Circuit's decision.

E. The Seventh Circuit's Decision Threatens Collective Bargaining Over Retirement Plans And Is Counter To Our National Labor Policy.

The Seventh Circuit seems to have determined that a contract ratification vote by union employees is at least one of the occasions when antifraud disclosures must be made if that contract provides for retirement plan coverage. If an employer bargains retirement plan participation for his employees, he will

[16] 29 U.S.C. § 1144(b)(2)(A): Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

have to insure that full and fair disclosures are made in order to protect against future ruinous liability and extensive litigation. Accordingly, the careful employer may have to attend any meeting set for ratification and participate to the extent necessary to present any omitted facts and correct any misleading statements. However, the employer's participation will violate Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2)), and render the entire collective bargaining agreement null and void. (*See, e.g., Mon River Towing, Inc.* v. *N.L.R.B.*, 421 F.2d 1, 8 (3d Cir. 1969); *Nassau and Suffolk Contractors' Ass'n.*, 118 NLRB 174 (1957); *Amalgamated Meat Cutters & Butcher Workmen of North America* v. *N.L.R.B.*, 276 F.2d 34 (1st Cir. 1960)).

In addition, if the Seventh Circuit's analysis is correct, the employer present at such meeting may need to discuss with the assembled employees whether they should receive additional cash wages instead of retirement benefits and, if so, how much. But such direct bargaining with employees would also violate the National Labor Relations Act. (*E.g., N.L.R.B.* v. *General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied,* 397 U.S. 965, *reh. denied,* 397 U.S. 1059 (1970)).

Finally, the Seventh Circuit's decision could lead unions and employers to decline bargaining concerning retirement plans. If employers were left to determine without bargaining whether and what retirement plan to institute, they would not be faced with the disclosure problems at an employee ratification vote and unions might avoid liability altogether. However, by encouraging such action, the Seventh Circuit has acted counter to our national labor policy.[17]

In sum, the Seventh Circuit's decision does not mesh well with our national labor policy and, indeed, may soon result in actions by employers and unions which will not serve the best interests of employees generally, or pension plan participants specifically.

CONCLUSION

For the reasons discussed above, it is most important that this Court grant the writs and decide whether employee participation interests in compulsory, noncontributory retirement plans are covered by the Securities Acts of 1933 and 1934.

Although no one can fully predict what will happen if the Seventh Circuit's decision is allowed to stand, there is, we submit, good reason to believe that the prospect of massive liability, extensive and costly litigation, additional overburdening administrative requirements and disrupted labor relations may lead unions and employers alike to the conclusion that existing retirement plans should be terminated or that new plans should not be started. Further, liability, litigation and increased administrative costs may threaten the financial stability of plans, and will at the least require an unnecessary diversion of moneys from retirement funds until the issue of whether the Securities Acts should be applicable to retirement plan interests is ultimately decided. Certainly, none of these consequences of a failure by this Court to decide the issue would serve the interests of employers,

[17] *See* note 9, *supra* and accompanying text.

unions, or retirement plan administrators. Just as certainly, they would ill serve the interests of employees.

Based on the foregoing, we respectfully submit that the petitions for writs of certiorari should be granted to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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